

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAAD M. SOLIMAN,	§	
	§	No. 270, 2006
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0502000655
	§	
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: November 6, 2006

Decided: January 10, 2007

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

ORDER

(1) Defendant-Appellant Saad M. Soliman appeals his Superior Court conviction of Conspiracy Third Degree.¹ Soliman makes three arguments in this appeal. First, he contends that the trial court committed plain error by not providing a specific unanimity instruction to the jury. Second, he contends that the jury verdicts were fatally inconsistent in this case. Finally, he claims that the trial court erred by failing to properly instruct the jury on accomplice credibility. We find no merit in his arguments and affirm.

¹ 11 Del. C. § 511.

(2) In the spring of 2004, Co-Defendants Soliman and Sandra Patterson became friends. Patterson was employed as a nurse at the Delaware Correctional Facility (“DCC”) infirmary. Soliman, an inmate at DCC, was assigned to work as an infirmary barber. Duncan, another DCC inmate, lived in the same housing unit as Soliman. Duncan was a supervisor of an environmental crew assigned to clean areas in the infirmary. Duncan’s status as a supervisor gave him unfettered access to the infirmary. In April of 2004, Soliman was reassigned to a different job so that he could no longer access the infirmary. Soliman asked Duncan, who still had access to the infirmary, if he would pick up some “Muslim oil”² from Patterson and deliver it to him. Soliman agreed to pay Duncan \$200, if Duncan successfully transported three shipments of Muslim oil to him.

(3) Duncan successfully delivered the oil on one occasion. On May 9, 2004, Duncan attempted to make a second delivery. He picked up a bag from Patterson, and, while walking back to his housing unit, was stopped by a correctional officer. The officer searched the bag and found nine bottles of Muslim oil, fifty smaller vials, three scarves, a letter addressed to “Papi” signed by “Boo,” several pictures, and Zyrtec and Ambien pills. Duncan plead guilty to misdemeanor charges of promoting prison contraband and conspiracy.

² Duncan explained that “Muslim Oil” is “a scented oil like cologne.”

(4) Soliman was charged with one count of Promoting Prison Contraband and one count of Conspiracy Third Degree.³ A Superior Court jury convicted Soliman of Conspiracy Third Degree but acquitted him of Promoting Prison Contraband. Soliman's motion for a new trial was denied by the Superior Court. He was sentenced to one year at Level 5 which was suspended for Level I probation. This appeal followed.

(5) Soliman first contends that the trial court erred by failing to give a specific unanimity instruction to the jury. Because Soliman did not object to the standard general unanimity instruction during trial, we review his claim for plain error.⁴ Plain error exists when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."⁵ Such an error must be apparent on the face of the record and be "so basic, serious and fundamental in their character that they clearly deprive an accused of a substantial right or show manifest injustice."⁶

(6) Soliman argues that because the conspiracy count referenced the promoting prison contraband count in the indictment, the trial judge was required

³ Another count of Promoting Prison Contraband and Conspiracy Third Degree were *nolle prossed* before trial.

⁴ "Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁵ *Id.*

⁶ *Hunter v. State*, 788 A.2d 131 (Del. 2001) (TABLE).

to provide the jury with a specific unanimity instruction.⁷ Specifically, he argues that some members of the jury could have found a conspiracy with regard to one of the enumerated items found in the bag Duncan was caught transporting to Soliman, and other members could have found a conspiracy with regard to a different item. Soliman argues that without the specific unanimity charge, the jury was “free to pick and choose” the items transported to form the conspiracy.

(7) In most cases, a general unanimity instruction is sufficient.⁸ A specific unanimity charge, however, is necessary “if (1) a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the state has presented evidence on each of the alternatives.”⁹ A specific unanimity instruction was not required in this case. The State did not argue, nor did the trial court instruct the jury, on alternative theories of liability. The only evidence the State presented regarding the conspiracy was the agreement between Soliman and

⁷ Count III of the indictment, Promoting Prison Contraband, provides that Soliman “did knowingly and unlawfully introduce contraband into a detention facility, to wit; Muslim oil, prescription drugs, vials or bottles into the Delaware Correctional Facility.” Count IV of the indictment, Conspiracy Third Degree, provides that to co-defendants, Soliman, Duncan and Patterson, “intending to promote the commission of a misdemeanor, did agree with each other to engage in conduct constituting the misdemeanor of Promoting Prison Contraband and did commit over act in furtherance of said conspiracy, by committing same *as set forth in Count(s) III of this Indictment, incorporated herein by reference.*” (emphasis added).

⁸ *Probst v. State*, 547 A.2d 114, 120 (Del. 1988); *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987).

⁹ *Probst*, 547 A.2d at 120-21.

Duncan to transport Muslim oil, not anything else. On the record before us, Soliman has not demonstrated plain error by the Superior Court.

(8) Soliman next contends that the trial court erred by not granting his Motion for a New Trial because the jury verdicts were fatally inconsistent. We review the denial of a motion for a new trial for abuse of discretion.¹⁰ Here, one of the grounds in Soliman's Motion for a New Trial was that the verdicts were inconsistent. On this point, Soliman's Motion for a New Trial was, in essence, a motion for judgment of acquittal. We review the denial of a motion for judgment of acquittal *de novo*.¹¹

(9) Soliman claims his conviction cannot stand because the jury's verdict acquitting him of Promoting Prison Contraband¹² is fatally inconsistent with the guilty verdict of Conspiracy in the Third Degree.¹³ It is well-settled that an

¹⁰ *James v. Glazer*, 570 A.2d 1150, 1156 (Del. 1990).

¹¹ *Guardarrama v. State*, 2006 WL 2950494, at *2 (Del. Supr.).

¹² 11 Del. C. § 1256 provides that "A person is guilty of promoting prison contraband when: (1) the person knowingly and unlawfully introduces any contraband into a detention facility; or (2) Being a person confined in a detention facility, the person knowingly and unlawfully makes, obtains or possesses any contraband."

¹³ 11 Del. C. § 511 provides:

A person is guilty of conspiracy in the third degree when, intending to promote or facilitate commission of a misdemeanor, the person:

(1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the misdemeanor or an attempt or solicitation to commit the misdemeanor; or

(2) Agrees to aid another person or persons in the planning or commission of the misdemeanor or an attempt or solicitation to commit the misdemeanor, and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

acquittal of the underlying crime does not necessitate an acquittal of a conspiracy charge.¹⁴ Furthermore, verdicts are not inconsistent when someone other than the Defendant commits the overt act in furtherance of the conspiracy.¹⁵

(10) To be guilty of Conspiracy in the Third Degree, the State was required to prove that Soliman, intending to promote prison contraband, agreed in the planning of the crime and that someone with whom he conspired, but not necessarily Soliman, committed an overt act in furtherance of that conspiracy. The State presented evidence that Duncan, a co-conspirator, committed the overt act when he picked up the bag containing Muslim oil from Patterson and attempted to deliver it to Soliman. Accordingly, the fact that Soliman was not convicted of Promoting Prison Contraband is of no legal consequence because that overt act was committed by Duncan. We find no fatal inconsistency in the verdicts.

(11) Soliman's final claim of error is that the trial court failed to properly instruct the jury on accomplice credibility despite Soliman's request for a specific

¹⁴ *Holland v. State*, 744 A.2d 980, 982 (Del. 2000) ("When the only overt act alleged is the underlying substantive crime, a defendant's acquittal on this charge negates the overt act element of the conspiracy *unless a co-conspirator committed the overt act.*") (emphasis added).

¹⁵ *Id.* In *Holland*, we explained that the difference between *Johnson v. State* and *Robertson v. State*, 630 A.2d 1084, 1095 (Del. 1993), *Alston v. State*, 554 A.2d 304, 312 (Del. 1989) and *Steward v. State*, 437 A.2d 153, 156 (Del. 1981), was that there was no evidence in *Johnson* that another co-conspirator committed an overt act. "These cases stand for the proposition that a conspiracy conviction is not legally inconsistent with an acquittal because a 'conviction is sustainable' whether a defendant 'or another person with whom he conspired commits an overt act in furtherance of the conspiracy.'" *Holland*, 744 A.2d at 982.

instruction. We review a decision on whether to give a particular instruction for abuse of discretion.¹⁶

(12) An instruction to the jury must be a correct statement of the law and be “reasonably informative and not misleading, judged by common practices.”¹⁷ Reversible error occurs only when the jury instruction undermined the jury’s ability “to intelligently perform its duty in returning a verdict.”¹⁸ “As a general rule, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law.”¹⁹

(13) The instruction in this case was a correct statement of the law, and Soliman does not argue otherwise. Instead, he claims that the pattern instruction fails to convey the inherent untrustworthiness in accomplice testimony to the jury.²⁰ He argues that this Court should require the instruction given in *Bland v. State*.²¹

¹⁶ *Fuller v. State*, 860 A.2d 324, 331 (Del. 2004).

¹⁷ *Cabrera v. State*, 747 A.2d 543, 544 (Del. 2000) (citing *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).

¹⁸ *Id.* (citing *Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973)).

¹⁹ *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

²⁰ The jury was instructed as follows:

The testimony of an alleged accomplice, someone who said that he participated with another person in the commission of a crime, has been presented in this case. [Witness] may be considered an alleged accomplice in this case. The fact that an alleged accomplice has entered a plea of guilty to certain offenses charged does not mean that any other person is guilty of the offenses charged.

As stated elsewhere in these instructions, you’re the sole judges of the credibility of each witness, of the weight to be given the testimony of each. You may consider all the factors which affect the witness’ credibility, including whether the

(14) This Court has previously rejected this argument. In *Cabrera*, we explained our departure from the instruction outlined in *Bland* and approved the pattern instruction used in this case.²² We did note in *Cabrera* that the trial judge instructed the jury to examine the accomplice’s testimony “with caution.” In *Bordley*, we rejected the very argument that Soliman makes here. This Court held that a *Cabrera* instruction on accomplice testimony was sufficient in itself, without language that the jury should examine the accomplice’s testimony “with caution.”²³ We find no reason to depart from this controlling precedent.

testimony of the accomplice has been affected by self-interest, by an agreement which he may have with the State, by his own interest in the outcome of the litigation, by prejudice against the defendant, or whether or not the testimony has been corroborated by any other evidence in the case.

²¹ 263 A.2d 286 (Del. 1970). The instruction cited in *Bland* read:

A portion of the evidence presented by the State is the testimony of an admitted participant in the crimes with which the defendant is charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with suspicion and great caution. This rule becomes particularly important if there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplice’s accusation that the defendant participated in the crime. Without such corroboration, you should not find the defendant guilty unless, after careful examination of the alleged accomplice’s testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendant guilty.

²² *Cabrera*, 747 A.2d at 544.

²³ *Bodley v. State*, 2003 WL 22227558, at *2 (Del. Supr.) (“Although the trial judge in the present case did not instruct the jury to examine [the accomplice’s] testimony “with caution,” the trial judge should be granted wide latitude in framing his instruction.”).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice